NO. 46240-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFF LEROY HARP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

I. The error is real and should be corrected.

The State concedes that appellant Jeff Harp was sentenced under an incorrect offender score. (Response at 2.) ("Harp's offender score should have been calculated as a 10 rather than a 12.") The error was driven by a misunderstanding about a prior conviction which should have counted once, not three times over. Mr. Harp should be resentenced. State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

Even if the miscalculation of the offender score does not change the applicable standard sentencing range, the error should be corrected. State v. McCorkle, 88 Wn.App. 485, 499-500, 945 P.2d 736 (1997) aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999). Below, the State recommended the low end of the 22 to 29 month range. RP 8. Mr. Harp asked for a prison-based Drug Offender Sentencing Alternative (DOSA). RP 6-8. The sentencing judge – likely influenced by the incorrect belief that Mr. Harp's offender score was a full three points into the top range – imposed a sentence of 24 months.

The State argues that a "resentencing is unnecessary," because Mr. Harp's standard sentencing range would be unaffected by the

correction of the scoring error. (Response at 4.) This Court already rejected such argument in McCorkle:

> The State argues that having established only nine prior felonies, rather than 13, is harmless error, since the standard range for an offender score of nine is the same as the standard range for an offender score of 13. We disagree that the error is harmless. The Washington Supreme Court recently held: "When the sentencing court incorrectly calculates the standard range ... remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Here the record does not clearly indicate that the sentencing court would have imposed the same sentence without the prior unclassified prior convictions and the resultant change in offender score.

McCorkle, 88 Wn.App. at 499-500. (Reversing and remanding for resentencing.)

The record below also does not clearly indicate that the sentencing court would have gone two months higher than the State's recommendation had the offender score been properly calculated.

II. This Court can provide effective relief.

Mr. Harp's subsequent release from prison custody does not render the appeal moot either.[1] It is true that a case is moot if a court can no longer provide effective relief, but that is not the case here. State

[1] As directed by the Court, under separate cover, appellant answers the State's motion to supplement and does not object to the consideration of the documents that confirm Mr. Harp has been released from prison.

v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) ("Because Ross' confinement and supervision ended... it is undisputed that this court cannot provide him with any effective relief, i.e., less confinement due to a lower offender score.") (Emphasis added.)

In State v. Harris, 148 Wn.App. 22, 26, 197 P.3d 1206 (2008), as amended (Mar. 10, 2009), this Court explained that:

> There are only two forms of effective relief from an excessive sentence that results from an offender score miscalculation. If a defendant received an excessive sentence and is still confined, we can order resentencing that will result in his timely release from confinement...
>
> But Harris is no longer confined. And if an offender is on community custody that should have begun earlier than it did (because he should have been released earlier), upon resentencing the trial court may modify the termination date of his community custody.

Harris, 26-27. (Internal citations omitted.) (Emphasis added.)

Mr. Harp is no longer confined in prison on this matter[2], but unlike Harris he was sentenced to community custody and remains on supervision.

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[2] Mr. Harp did try to get this problem fixed, while he was in prison, and not once, but twice. CP-A 37-41, 51-54. (CP-A citations refer to Clerk's Papers for cause number 13-1-00418-3). The trial court denied his *pro se* pleadings without ever reaching the offender scoring issue he wanted corrected. CP-A 50, 55; RP 11-12.

> The issue of Harris's offender score calculation is moot because he has been released from confinement, is not on community custody, and is not subject to another miscalculation based on this alleged error if he is convicted of another crime in the future.

Harris, at 26. (Emphasis added.)

Unlike Harris, Mr. Harp remains on community custody and can be provided with effective relief. The matter should be reversed and remanded for resentencing where he could request both a term under 24 months and a modification of the termination of his community custody.

Additionally, Mr. Harp has a real individual interest in the correction of the scoring error and a resentencing. Criminal justice system actors review past conviction and sentencing information about a defendant when making all kinds of discretionary decisions, be it the filing of a charge, or the imposition of a particular sentence. Were Mr. Harp to come under law enforcement scrutiny again, there is a real risk that the record (incorrectly) describing him as a maxed-out with an offender score of "12" would influence how he would be treated. The Harris opinion does make the point that "a future sentencing court may not simply rely on a criminal history from a previous judgment but must compute the offender score anew at any future sentencing

hearing." Harris at 28. Still, under RCW 5.44.010 and ER 902(d) certified court records are self-authenticating and admissible. State v. Benefiel, 131 Wn.App. 651, 654-55, 128 P.3d 1251 (2006). The error should not be following Mr. Harp into the future. A future sentencing court may very well undergo its own offender scoring calculation as pointed out in Harris. But, unless Mr. Harp gets a chance now to be re-sentenced with the correct offender score, the court file will forever show that at least one judge already determined that he deserves more than a low-end standard range sentence. This too is why this Court can provide effective relief even though Mr. Harp already served out his prison term.

B. CONCLUSION

Appellant Jeff Harp respectfully asks this Court to reverse and remand for a new sentencing hearing.

DATED this 20th day of March 2015.

Respectfully submitted,

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Attorneys for Appellant

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JEFF HARP,	)	
	)	
APPELLANT.	)	

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